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No. 95-1349

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1995

ARTURO MORALES, Petitioner
v.
INDUSTRIAL COMMISSION OF ARIZONA,
HIDRO GAS,
RELIANCE INSURANCE COMPANY,
Respondents

On Petition for Writ of Certiorari
To The Supreme Court of Arizona

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether the Arizona legislature's 1980 amendment of Arizona Revised Statute (A.R.S.) § 1061(A), strictly limiting the circumstances under which the untimeliness of a workers' compensation claim may be excused, impermissibly denied procedural due process to the petitioner, Arturo Morales.

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BRIEF IN OPPOSITION

The respondent employer and insurance carrier, Hidro Gas and Reliance Insurance Company respectively, on their own behalf and that of the Industrial Commission of Arizona, respectfully request this Court to deny the petition for writ of certiorari filed by Arturo Morales, the petitioner.

Relevant Statutes

In addition to the constitutional and statutory provisions quoted by the petitioner, the following subsections of A.R.S. § 23-908 are relevant:

> F. Within ten days after receiving notice of an accident, the employer shall inform his insurance carrier and the commission on such forms and in such manner as may be prescribed by the commission.
>
> . . . .
>
> H. Any person failing or refusing to comply with the provisions of this section is guilty of a petty offense.

A.R.S. § 23-908(F) & (H) (1995).

Statement of the Case

I. Factual Background

Morales was injured on July 18, 1990 when he lost control of the truck and semi-trailer he was driving and rolled off the interstate highway near Gila Bend, Arizona. He was en route from Tijuana, Mexico to Peoria, Arizona, where he was to pick up a load of propane fuel and return it to Tijuana for the respondent employer, Hidro Gas.

Hidro Gas is a Mexican corporation with an office in El Paso, Texas. Morales himself is a Mexican citizen and a resident of Juarez in the state of Chihuahua. Although it is undisputed that he was hired by Hidro Gas in 1983, there is contradictory evidence as to whether he was hired in Texas or Mexico. In either case, he initially worked out of Texas. From November 1989 on, however, his regular, daily route had been between Tijuana and Peoria.

So severe were Morales' injuries that he was hospitalized in Yuma for a week following the accident. Contrary to his present claim that he "remained immobile" for the following year, Petition at 5, he returned to Juarez upon his release and thereafter consulted an attorney.

At the Industrial Commission of Arizona's hearing, Morales's local attorney stated that the records of the Texas attorney, James Scherr, contained "mention of representation in March of '91." See Petition, App. A, at

12, 13 n.8. The Commission accordingly found that Morales "was acting under the advice of an attorney as early as March, 1991, well within the one year filing period." Petition, App. C, at 31.

Whether the advising attorney was Scherr is a matter of dispute. What is not disputed is that Morales formally retained Scherr on October 3, 1991 and that this attorney represented Morales first in a common-law negligence claim against his employer. Scherr then represented Morales in a Texas workers' compensation claim. Although Morales did not retain Scherr for the latter purpose until November 8, 1991, the Texas claim he filed two days earlier was on the advice of the attorney.

The claim was denied in May 1992 on the ground that Morales was not an employee within the Texas Act. The denial is still on appeal in the courts of that state. In the meantime, on November 23, 1992, two years and four months after the industrial injury, Morales filed a workers' compensation claim in Arizona.[1] In the meantime, too, he began receiving benefits under Mexico's social security system.

[1] His filing on this date belies his later claim that he was unable to recognize the compensable character of his injury under Arizona law until December 1992, when the carrier first contended the claim should have been brought in Arizona.

II. Procedural Background

Morales' Arizona claim was denied on April 5, 1993. He protested the denial, the respondents raised the untimeliness of the claim as an affirmative defense, and the case proceeded to hearing on November 15, 1993. The resulting award found that the claim was indeed untimely and that the untimeliness was not excused under A.R.S. § 23-1061(A). See Petition, App. C.

Morales protested the Commission's award on two grounds unrelated to the pending petition. See Petition, App. E. His only constitutional argument was that the full faith and credit clause required Arizona to apply Texas's saving statute to his claim. Id. at 38. The Commission's finding that he had acted with the advice of counsel since at least March 1991 went unchallenged.

Once the Commission affirmed its award, Morales appealed to the Arizona Court of Appeals. Here, for the first time, he touched on the issue now before this Court. He argued, without citation to any specific authority, that to enforce the one-year limit on an employee's time to file a claim "without imposing a similar penalty on an employer who violates the Act by failing to report the injury" is to deprive the employee of an opportunity for a hearing, in violation of the due process clause. See Petition, App. F, at 53-54.[2]

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[2] Morales separately argued that the statute of limitations for filing his Arizona claim should have been tolled until his employer

The court of appeals declined to consider Morales' due process argument, as well as five other new issues he raised, because they had not been preserved for review. See Petition, App. A, at 18-19. It also rejected his claim that the due process argument should be considered under an exception recognized by the Arizona court for questions of "a general public nature, affecting the interests of the state at large." Id. at 17-19 (quoting Ruth v. Industrial Commission, 490 P.2d 828, 830 (Ariz. 1971)). The court held, to the contrary, that the "current case will affect few claimants other than Morales." Id. at 19.

In petitioning the Arizona Supreme Court for review, Morales invoked the due process clause to argue variously that Arizona's Workers' Compensation Act was facially invalid and that it was invalid as applied. See Petition, App. G, at 60, 66-67. In the name of due process, he also invoked Arizona's saving statute. Id. at 67 ("the one-year limitations period, without a tolling [sic] provision while the same is pending in a foreign jurisdiction, operates to deprive him of his due process right to a hearing"). He finally also asserted the argument now before this Court, that the "dissimilar" penalties imposed on employees and employers who violate the Act constitutes a due process violation. Id. at 68.

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filed the required report with the state's Industrial Commission. This argument was based not on the due-process clause, however, but on the asserted requirement that Arizona apply Texas law to his claim. See id. at 48-49.

On November 22, 1995 the Arizona Supreme Court denied Morales's petition for review. The lower court's holding that Morales had not preserved the due process issue for review thereby became final.

Reasons to Deny the Writ

I. Introduction

The foregoing procedural history establishes that Morales's due process claim is not properly before this Court. His new arguments, addressed in Section II below, compel no different conclusion.

Even if jurisdiction were not at issue, however, the petitioner's other arguments defy both established federal and state law and basic principles of equity.

II. This Court lacks jurisdiction over Morales' due process claim because the Arizona court's refusal to consider it was based on adequate and independent state grounds.

The general rule in Arizona, as elsewhere, is that an issue not raised before the Industrial Commission is not subject to appellate review. See Stephens v. Industrial Commission, 559 P.2d 212, 214 (Ariz. Ct. App. 1979). Arizona makes an exception for issues of "a general public nature, affecting the interests of the state at large." Ruth, 490 P.2d at 830. Under both the rule and its exception, the court of appeals declined to consider Morales' claim that the Workers' Compensation Act deprived him of

notice and an opportunity to be heard.

Contrary to Morales's assertion, the Arizona court has applied the general rule consistently. This is evident even from the cases he cites for a contrary proposition. Ruth itself adjudicated eight consolidated claims challenging Arizona's lien statute on the ground that it did not require the compensation carrier to share the cost of the claimant's third-party action. As such, it "addressed an issue that affects every workers' compensation claimant who also has a third-party civil remedy." Petition, App. A, at 19.

The other two cases on which Morales relies involved hearings before administrative bodies other than the Industrial Commission. In Rouse v. Scottsdale Unified School District, 752 P.2d 22 (Ariz. Ct. App. 1987), rev. denied (1988), a terminated teacher asserted for the first time on appeal that his due process rights were violated where his review hearing was conducted by the same school board that had terminated him. The court of appeals determined that this issue went to the "competency of the board itself." Id. at 24. As such, it was "akin to a jurisdictional question," which may be raised at any point in a proceeding. See id. For this reason alone, the court held that Rouse's failure to raise the issue before the board did not preclude judicial review. Id.

In Campbell v. Chatwin, 428 P.2d 108 (Ariz. 1967), the real parties in interest were three persons whose driver's licenses or vehicular registrations had been

suspended. All had appealed to the superior court without first requesting a hearing before the Arizona Highway Department. Acknowledging the general rule that a party must exhaust administrative remedies, the court declared the rule inapplicable in the limited circumstance "where, by the terms or implications of a statute authorizing the administrative remedy, the remedy is permissive only." Id. at 114. Despite its dicta, echoed in Rouse, that the exhaustion rule should not be "summarily applied where jurisdiction of the agency is being contested," id., the Campbell court went on to find the rule applicable here. These cases, in summary, do not establish any unreasoned inconsistency in the court's application of the rule.

Morales's further assertion that the Industrial Commission's fact-finding expertise could serve no legitimate function in the adjudication of his constitutional claim is similarly mistaken. Admittedly the Commission could not declare the statute governing a claim's timeliness unconstitutional. But it could have made findings relevant to, if not determinative of, the more concrete issue of notice. Had the issue been properly raised, the record might now include, for example, Morales's own testimony on when he first consulted an attorney, who that attorney was, and whether he was licensed to practice in any of the United States. As the record stands, only the averments of local counsel address any of these matters.

The Arizona Court of Appeals accordingly did not err in holding that Morales had not preserved his due

process claim for review. Neither did it err in the conclusion that Morales's case would affect few other claimants. Indeed it is as rare as legal malpractice itself that a worker who has been injured on the job will -- on the advice of an attorney -- bring a tort action against his employer, then file a workers' compensation claim not only belatedly but in the wrong state. Nothing about this case raises any question of "a general public nature, affecting the interests of the state at large."

II. Arizona's statute governing the timeliness of claims does not implicate the due process clause either in what the statute provides or in what it omits.

Prior to its amendment in 1980, Arizona's statute establishing a one-year limitation for the filing of compensation claims had been liberally construed by the court. See Allen v. Industrial Commission, 733 P.2d 290, 294-95 (Ariz. 1987) (reviewing the history and constitutionality of A.R.S. § 23-1061(A)). Based on the statutory provision that the failure to timely file must be raised at the first hearing, A.R.S. § 23-1061(D), the court construed the one-year filing requirement as an affirmative defense. Allen, 733 P.2d at 294-95. As such, an employer could be equitably estopped from raising the defense "where he had, by his own conduct, caused the employee to forebear [sic] filing a claim." Id. at 295 (quoting Van Horn v. Industrial Commission, 527 P.2d 282, 284 (Ariz. 1974) ("Van Horn II")).

In 1980 the legislature amended A.R.S. § 23-1061 "expressly to deprive the Commission and the courts of jurisdiction to excuse late filings except on certain enumerated grounds."[3] Id. The Allen court declared the amendment constitutional on two grounds: first, because the legislature may reasonably regulate the time in which a compensation claim may be filed and, second, because the amended statute still provided claimants with "a reasonable opportunity to file a claim." Id. at 297. The amendment therefore did not violate the state constitutional mandate for a "just and humane compensation law." Id. (citing Ariz. Const. art. XVIII, § 8).

Since 1968 a separate section of Arizona's Act has required employers to report industrial accidents to the Commission and has provided penalties for their failure to do so. A.R.S. § 23-908(F) & (H) (quoted supra at p. 1). The relevant subsections have been unchanged since 1968. A.R.S. § 23-908, Hist. & Stat. Notes (1995). Arguably, the employer's failure to file the required report might have estopped it from raising the statute of limitations as a defense prior to the 1980 amendment of A.R.S. § 23-1061(A).

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[3] Although Morales's pleadings in state court sought to bring him within the enumerated exceptions, his petition to this Court makes no such claim.

The evolution of section 23-1061(A) has inversely reflected the evolution of the federal Longshore and Harbor Workers' Compensation Act, 33 U.S.C.A. §§ 901 et seq. (hereafter "LHWCA"). As originally enacted, the LHWCA provided:

> The right to compensation for disability under this chapter shall be barred unless a claim therefor is filed within one year after the injury, and the right to compensation for death shall be barred unless a claim therefor is filed within one year after the death . . . .

33 U.S.C.A. § 913(a), quoted in Ayers v. Parker, 15 F. Supp. 447, 448 (D. Md. 1936). Like Arizona's present A.R.S. § 23-1061, the federal statute went on to enumerate specific exceptions to the one-year filing requirement. See id. § 913(c) & (d), quoted in Ayers, 15 F. Supp. at 448-49. A separate section required the employer to report the injury to the Secretary within ten days of its occurrence. 33 U.S.C.A. § 930(a), cited in Ayers, 15 F. Supp. at 452.

In Ayers, a widow's death claim was rejected on the ground that it was not filed within one year of the date of death and that it did not fall within any of the statutory exceptions. The widow's argument strikingly parallels Morales'. She argued that the employer should be estopped from raising the claim's untimeliness as a defense

> because of its own failure to comply with section 30 of the act (33 U.S.C.A. § 930) which requires all employers to make a detailed report to the commission and Deputy Commissioner within ten days of the date of any injury to or death of employees, subjecting the employer to a civil penalty not exceeding $500 for every failure or refusal so to do . . . .

Ayers, 15 F. Supp. at 452.

The court unequivocally declared the widow's argument meritless. See id. Conceding that the employer should have reported the injury or death if it was within the Act, "nevertheless section 30 is entirely separate and distinct from section 13. Id. (emphasis added). The court affirmed the Deputy Commissioner's rejection of the widow's claim.

In Young v. Hoage, 90 F.2d 395 (D.C. Cir. 1937), the court of appeals similarly considered whether a widow was entitled to death benefits under the LHWCA where she, too, had filed no claim within one year. Reviewing the case law of states with provisions similar to section 913, the court concluded:

> [W]here a statute gives a right of the character in question -- a right unknown to the common law -- and limits the time within which an action shall be brought to

> assert it, the limitation defines and controls the right.

Id. at 400 (citing William Danzer & Co. v. Gulf R. Co., 268 U.S. 633 (1925)). Again, the court affirmed the rejection of the widow's claim.

In 1938, the LHWCA was amended to include a provision tolling the limitations period of section 913(a) until the employer filed the report required by section 930(a). 33 U.S.C.A. § 930(f) & Hist. Note (1986). In February 1938, less than a year before the amendment became effective, a longshoreman named Steffen sustained an injury compensable under the LHWCA. Associated Indemnity Corp. v. Pillsbury, 147 F.2d 546, 546 (9th Cir. 1945). Returning to work after only a few days, Steffen filed no claim for compensation at the time. His employer, who knew about the injury, filed no report. By August 1938 Steffen had become completely disabled from his injury. Still he filed no claim until January 1941.

In arguing that Steffen's claim was barred under section 913(a), the employer asserted that the amendment tolling the limitations period could not be given retroactive effect. Id. Such effect would be barred if the amendment were deemed substantive. See, e.g., Pierce v. Hobart Corp., 939 F.2d 1305 (5th Cir. 1991). The Ninth Circuit declared, however, that the amendment "related purely to a matter of administration." 147 F.2d at 546-47 (Congress apparently intended to give employers an additional incentive for obeying the statutory mandate). It held that

Steffen's claim was not time-barred.

This line of cases establishes what a survey of the states' current workers' compensation statutes confirms: that whether or not the limitations period for filing a claim is tolled until the employer files its report, the statutory scheme does not implicate any substantive rights, much less the constitutional right to notice and a hearing.

Indeed, it is well established that

> [u]nder some statutes, but not others, the failure of the employer to file the required report of the accident deprives the employer of the defense of limitations or extends the time within which the employee may file his claim.

100 C.J.S. Workmen's Compensation § 475, at 390 (1958). Where the statute does not so provide, however, "the employer's mere failure to report the accident . . . as required does not toll" the limitations period. Id. at 391. The penalty against the employer under such statutes is whatever the legislature prescribes. See, e.g., Poythress v. J.P. Stevens & Co., 283 S.E.2d 573, 579 (1981), rev. denied, (1982).

Although the statutes of many states are or have been in the latter group with Arizona's, see 100 C.J.S. Workmen's Compensation § 475, at 391. n. 49 (1958 and Supp. 1995); DeRousse v. PPG Industries, 598 S.W.2d

106 (Mo. 1980), the petitioner cites not a single authority even suggesting that such statutes may violate due process. Because federal courts presume that state legislatures act constitutionally, Hartford Fire Insurance Co. v. Lawrence, Dykes, Goodenberger, Bower & Clancy, 740 F.2d 1362 ((6th Cir. 1984), and because the burden of demonstrating unconstitutionality is on the party assailing a law, United States v. Conner, 715 F. Supp. 1327 (W.D.N.C. 1989), Morales's challenge to A.R.S. § 23-1061(A) must fail.

III. Morales's petition derogates the principles of due process that underlie the case law construing the LHWCA as well as the challenged provisions of Arizona's Workers' Compensation Act.

The amount of process due under the fifth and fourteenth amendments is "minimal." Thomas v. Devries, 834 F. Supp. 398 (M.D. Ga. 1993) aff'd, (11th Cir. 36 F.3d 95). Due process is "not a technical abstraction unrelated to time, place, and circumstances, but rather an embodiment of fundamental principles of fair play and justice." Erwin v. City of Santa Fe, 599, 855 P.2d 1060, 1063 (N.M. Ct. App. 1993) (citing Lassiter v. Department of Social Services, 452 U.S. 18, 24 (1981)). As such, due process dictates "no single model of procedural fairness, let alone a particular form of procedure." Kremer v. Chemical Construction Corp., 456 U.S. 461, 483 (1982).

In the case of statutes, notice is constructively given and due process satisfied by mere publication. Breath v. Cronvich, 729 F.2d 1006, 1011 (5th Cir.) cert denied, 469

U.S. 934 (1984). Therefore, even though the 1980 amendment of A.R.S. § 23-1061(A) eliminated all meritorious excuses for untimely filing except those specifically enumerated therein, Morales cannot be heard to complain that he was thereby denied notice of the one-year filing requirement. When a legislature enacts "general legislation eliminating a statutory right, or affecting the 'benefits and burdens of economic life,'" the legislative process itself provides all the process that is due. Ponce Paramedical College v. United States Department of Education, 858 F. Supp. 303, 314 (D.P.R. 1994) (citations omitted).

Ignorance of the statute, therefore, cannot form the basis of a due process challenge. Gaston v. Taylor, 946 F.2d 340, 342 (4th Cir. 1991). Where, as in Arizona, the Workers' Compensation Act allows claimants a full year to file their claims, Morales' failure to avail himself of the statutory procedure, whether or not he had actual knowledge of it, does not constitute a violation of due process. See Bonilla v. Rodriguez, 635 F. Supp. 148, 153 (D.P.R. 1986).

In the instant case, moreover, Morales was either represented by or acting under the advice of an attorney well within the one-year limitations period. Whether or not the attorney had actual knowledge of workers' compensation law in general and Arizona's law in particular, such knowledge is imputed to him or her. As Morales's agent, the attorney's knowledge is in turn imputed to Morales. Between the two of them, then, they

knew both that Morales had sustained an industrial injury and that he had one year from the date of injury to file an Arizona claim.

> [D]ue process is not offended by requiring a person with actual, timely knowledge of an event that may affect a right to exercise due diligence and take necessary steps to preserve that right.

In re Medaglia, 52 F.3d 451, 455 (2d Cir. 1995). Neither is due process offended by not providing personal notice to a person who already has constructive knowledge of the matters of which they might be notified. See Moreau v. Federal Energy Regulatory Commission, 982 F.2d 556, 569 (D.C. Cir. 1993).

Whatever knowledge Morales claims would have come to him through the employer's statutorily required report, therefore, is knowledge he already had. He had knowledge of the event giving rise to his claim. He had knowledge of Arizona's Act through its enactment and publication. He had knowledge of its specific filing requirement. His due process rights were therefore not violated by the absence of a statutory penalty against the employer that would toll the limitations period until he received personal notice. See Tulsa Professional Collections Services v. Pope, 485 U.S. 478 (1988) (due process does not require that potential plaintiffs be given notice of the impending expiration of the limitations period).

IV. Morales's petition derogates the separation of powers doctrine that underlies the case law construing the LHWCA as well as the challenged provisions of Arizona's Act.

The flexibility the due process clause affords legislatures in fashioning procedures is reinforced by the separation of powers doctrine. Thus the Ninth Circuit declared:

> [W]hether legislation meets its objectives is never a basis for [the court's] striking it down. Congress is not required to enact perfect legislation.

Das v. Department of Health & Human Services, 17 F.3d 1250, 1256 (9th Cir. 1994) (citing Dandridge v. Williams, 397 U.S. 471, 485 (1970)). Declining to find a specific statute violative of due process, the Seventh Circuit stated that "[d]ue process just requires procedures that will usually lead to correct outcomes." Del's Big Saver Foods v. Carpenter Cook, Inc., 795 F.2d 1344, 1350 (7th Cir. 1986). The First Circuit stated similarly that the Constitution simply "does not require every procedural protection that might help." Newman v. Burgin, 930 F.2d 955, 961 (1st Cir. 1991).

Together these principles refute Morales's charge that Arizona's Workers' Compensation Act deprived him of due process. It was entirely within the Arizona legislature's prerogative to limit the sanctions for an

employer's violation of the reporting requirement as it did. See A.R.S. § 908(H) (violating employer is guilty of a petty offense). That tolling the limitations period for filing a claim might have given employers "an additional incentive for obeying the statutory mandate," see Associated Indemnity Corp., 147 F.2d at 547, is constitutionally immaterial. The due process clause does not require every procedural protection that might possibly help.

Federal and state courts have regularly applied these principles to due process challenges to statutes of limitations. In Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982), this Court stated unequivocally that not every civil litigant is entitled to a hearing on the merits in every case:

> The State may erect reasonable procedural requirements for triggering the right to an adjudication, [including] statutes of limitations . . . . And the State certainly accords due process when it terminates a claim for failure to comply with a reasonable procedural . . . rule.

Id. at 437 (emphasis in original) (citations omitted). See also Chase Securities Corp. v. Donaldson, 325 U.S. 304, 313-16 (1945) (statutes of limitations are by definition arbitrary; they come into law not through the judicial process but through legislation; they represent a public policy about the privilege to litigate).

Where, in a workers' compensation act, the state legislature has chosen not to toll the statute of limitations until an employer files the required report, the legislative prerogative has been uniformly upheld. Thus, for example, in DeRousse, the injured employee argued that the eight-year delay in filing his compensation claim should be excused because of the employer's failure to report the injury as required by statute. 598 S.W.2d at 107. Michigan's Act, like Arizona's, required the employee's claim to be filed within one year of the injury unless one of the several specified exceptions applied. See id. The Act also required the employer to file its report within ten days after acquiring knowledge of the injury, and it specified the penalty for violation of the requirement as

> a fine of not less than fifty nor more than five hundred dollars, or . . . imprisonment in the county jail for not less than one week nor more than one year, or both the fine and imprisonment.

Id. at 107-08 (quoting Mo. Rev. Stat. § 287.380.4 (1978)).

The Supreme Court of Missouri soundly rejected the employee's argument. Reasoning that the employer's failure to report the accident "in no way prevents the injured employee from filing a claim," id. at 110, the court held:

> Had the legislature intended that the employer's neglect or failure to file a report of injury should toll the limitations period, it "would have adopted the simple, certain, and easy method of directly incorporating such provision." The legislature's omission of tolling from the sanctions authorized for the employer's failure to comply with [Mo. Rev. Stat.] § 287.380 indicates that tolling is not an appropriate sanction for such failure, absent fraud. "Statutes of limitations are favored in the law, and cannot be avoided unless the party seeking to do so brings himself strictly within [an] exception."
>
> . . . .
>
> . . . "[C]ourts are not at liberty to write into [the Workmen's Compensation Law] under the guise of construction, provisions which the legislature did not see fit to insert."

Id. at 111-13 (citations omitted) (interpolations in original).

Under similar facts the Supreme Court of Indiana refused to "substitute our convictions as to the desirability or wisdom of legislation for those of our elected representatives." Bunker v. National Gypsum Co., 441 N.E.2d 8, 11 (Ind. 1982) cert. dismissed, 460 U.S. 1076

(1983). The court declared that legislative statutes of limitations, like other legislation, "carry a general presumption of constitutionality":

> A statute of limitations will comport with due process so long as it provides a reasonable time for the bringing of an action. . . . "In respect to substantive rights, conferred by law, or acquired by contract, there is no doubt of constitutional protection without modification or change. It is otherwise with a mere remedy. A remedy is nothing more than the means provided by law for the enforcement of rights, and is not of itself a right . . . . [A]s pertaining to a mere remedy, there exists no doubt of legislative power to make such changes therein as to it seems fit, if in doing so it preserves or provides a reasonable means and opportunity for full enjoyment of the right." The legislature has the sole duty and responsibility to determine what constitutes a reasonable time for the bringing of an action unless the period allowed is so manifestly insufficient that it represents a denial of justice.

Id. at 12 (citations omitted).

Morales does not contend that the limitations period established by A.R.S. § 23-1061(A) is in itself

insufficient. Rather he contends that the legislature erred in not providing an additional exception to its running, where the employer does not file the report required by A.R.S. § 908(F). As the above-cited cases suggest, Morales' claim should be addressed not to the court but to the legislature. The former may not constitutionally "second-guess" the latter, charged as the legislature is with the "heavy responsibility of regulating the social obligations that exist between the employee, the employer, and the public." Desselle v. Liberty Mutual Insurance Co., 482 So. 2d 1009, 1012 (La. Ct. App. 1986).

V. The untimeliness of Morales's claim is causally unrelated to any provisions of or omissions in Arizona's Act or to his employer's failure to comply with the Act's reporting requirement.

Morales's failure to file his Arizona claim until two years and four months after his industrial accident cannot be attributed either to his employer's violation of A.R.S. § 23-908(F) or to the absence of a provision tolling the limitations period until the employer files the report required by that section. Morales's failure is attributable to entirely unrelated causes.

Despite the severity of his industrial injuries, Morales managed to consult an attorney within eight months of their occurrence. Clearly, he considered the compensability of his injuries at that time. In fact, the consultation led to the retention of counsel, the filing of a negligence action against his employer, and later the

filing of a workers' compensation claim in Texas.

That Morales and his attorney misperceived the nature of their remedy and chose a wrong forum for their belated industrial claim was entirely their own doing. So, too, was their very belated recognition that the claim should have been filed in Arizona. See supra note 1 and accompanying text. It was these actions, rather than any shortcomings on the part of the Arizona legislature or Morales's employer, that caused his claim to be untimely.

Confronted with similar facts in Eaton v. Bath Iron Works, 502 A.2d 1040 (Me. 1986), the Supreme Judicial Court of Maine reached precisely the same conclusion. Two and a half years elapsed there between the time of the employee's industrial injury and the time he filed his claim. Although the employer had received timely notice of the injury, it waited until the employee filed his claim before filing the employer's report required by the Maine Act.

Like Morales, the employee argued that if the employer had timely filed its report,

> the notification mechanism . . . would have been triggered, and he would have been informed about the . . . statute of limitations. Inasmuch as his failure to file a claim within the statute of limitations was caused by the inactivity of the employer, [the employee] argues that [it] should be

equitably estopped from using this defense.

Id. at 1042. The court rejected the employee's argument. It held it "incumbent on the employee to establish a causal link" between the employer's failure and his own delay. Id. at 1043. In the absence of such evidence the court found the doctrine of equitable estoppel inapplicable and the employee's claim time-barred. See id.

Even if Morales had carried his burden of proving Arizona's statutory scheme unconstitutional, therefore, his petition should not be granted. The record is devoid of any evidence that the statutory scheme, rather than the pursuit of mistaken remedies, caused his claim to be filed untimely.

Conclusion

The petition for certiorari should be denied. The Arizona Court of Appeals' decision and the Arizona Supreme Court's refusal to review it are fully in accord with the decisions of both federal and state courts.

Respectfully submitted,

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